



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PETER FRANKLIN,

Plaintiff,

- against -

08 Civ. 7120 (DAB)  
ORDER

LIBERTY MUTUAL INSURANCE, CO. AND  
EDMUND F. KELLY,

Defendants.

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DEBORAH A. BATTS, United States District Judge.

A Complaint in the above-captioned action was filed on August 11, 2008, and an Amended Complaint was subsequently filed on September 22, 2008. On November 21, 2008, this case was referred to Magistrate Judge Debra Freeman.

On April 28, 2009, the Court received a letter from Marshall T. Potashner in which he sought leave to dismiss for, among other things, failure to timely effect service of process. On May 15, 2009, the Court received a letter from pro se Plaintiff Peter Franklin who alleged that "[t]he service was done by the Court." Both letters were forwarded to Judge Freeman. On May 26, 2009, Judge Freeman directed Plaintiff "to file proof of service, or show good cause why timely service was not made pursuant to Rule 4(m) of the Federal Rules of Civil Procedure." Judge Freeman Ordered Plaintiff to respond no later than June 5, 2009. Plaintiff failed to respond to Judge Freeman's Order. On June 26, 2009, the Court received a letter from the Plaintiff

indicating that "I never received the document from Judge Freeman about me having to do something before June 5, 2009."

On June 29, 2009 the Court granted Plaintiff forty-five (45) days to file proof of service or show cause. In that same Order the Court directed the Pro Se office to mail to the Plaintiff any information he might need to serve properly the Defendants in this case. On August 25, 2009, the Pro se office informed the Court that this was done on July 13, 2009.

The Court's June 29, 2009 ORDER, though mailed to the address on Plaintiff's docket sheet, which conforms to the date of Plaintiff's letter received June 26, 2009, was returned to the Court as unclaimed.

The Court considers the following factors in making the determination as to whether dismissal is warranted: (1) the duration of the plaintiff's failures, (2) whether plaintiff had received notice that further delays would result in dismissal, (3) whether the defendant is likely to be prejudiced by further delay, (4) the need to strike a balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard, and (5) the efficacy of lesser sanctions. Burrell v. AT & T, 63 Fed.Appx. 588, 589, 2003 WL 21182089, 1 (2d Cir. 2003).

Dismissal is appropriate here where Plaintiff has failed to file proof of service for over six months. Additionally, both

Magistrate Judge Freeman and this Court's efforts to notify Plaintiff how to proceed have failed. The Defendant would surely be prejudiced by further delay. Accordingly, this action is HEREBY DISMISSED for failure to prosecute.

SO ORDERED.

Dated: New York, New York

August 24, 2009

Deborah A. Batts

Deborah A. Batts  
United States District Judge